No. 80-1713

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

SHUTAO H. LIN, as Administrator of the Goods, Chattels and Credits which were of SHU REN LIN, M.D., Deceased; JOSEPH P. MALACYNSKI, as Administrator of the Estate of MICHELLE MALACYNSKI, and JOSEPH P. MALACYNSKI, individually; DONALD R. LYON and SOPHIE H. LYON; and JANE S. SHATKIN, as Executrix of the Estate of LLOYD J. SHATKIN, Deceased,

Petitioners,

vs.

AMERICAN AIRLINES, INC. and McDONNELL DOUGLAS CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT McDONNELL DOUGLAS CORPORATION IN OPPOSITION

NORMAN J. BARRY
JOSEPH P. DELLA MARIA, JR.
ROGER J. GUERIN
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Attorneys for Respondent, McDonnell Douglas Corporation

Of Counsel:
PHILIP B. KURLAND, ESQ.
ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
VERYL L. RIDDLE, ESQ.
THOMAS C. WALSH, ESQ.
JOHN J. HENNELLY, JR., ESQ.
BRYAN, CAVE, McPHEETERS & McROBERTS
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
JAMES M. FITZSIMONS, ESQ.
GARRETT J. FITZPATRICK, ESQ.
MENDES & MOUNT
Three Park Avenue
New York, New York 10016
(212) 683-2400

Pandick Press Midwest Inc., Chicago • 454-7600

Statement Required by Rule 28.1

This brief is filed on behalf of McDonnell Douglas Corporation, which has no parent companies or subsidiary or affiliated companies (except wholly-owned subsidiaries).

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Statement of the Case 1
Summary of Argument 3
The Writ Should Be Denied 4
I. No Reason Exists for This Court to Review the Interlocutory Judgment on the Choice of Law Issues Presented in This Case, Which Are Issues of State Law 4
II. No Choice of Law Rule Required the Court of Appeals to Apply the Substantive Law of Missouri, Which Has No Interest in This Litigation .. 5
III. Wrongful Death Acts Disallowing Punitive Damages Do Not Violate the Equal Protection Clause 7
Conclusion 10

TABLE OF AUTHORITIES

Cases

PAGE

Aetna Life Insurance Co. v. *Moses*, 287 U. S. 530 (1933) 9
Babcock v. *Jackson*, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279 (1963) 5
Baker v. *Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808) 9
Estate of Spiegel v. *Commissioner*, 335 U. S. 701 (1949) 5
General Box Co. v. *United States*, 351 U. S. 159 (1956) 5
Gentile v. *Altermatt*, 169 Conn. 267, 363 A. 2d 1 (1975), *appeal dismissed for want of a substantial federal question*, 423 U. S. 1041 (1976) 8
Georgie Boy Manufacturing, Inc. v. *Superior Court*, 115 Cal. App. 3d 217, 171 Cal. Rptr. 382 (1981) 8
Glick v. *Ballentine Produce Inc.*, 396 S. W. 2d 609 (Mo. 1965), *appeal dismissed for want of a substantial federal question*, 385 U. S. 5 (1966) .. 8
Hicks v. *Miranda*, 422 U. S. 332 (1975) 8
Hill v. *Garner*, 277 Ore. 641, 561 P. 2d 1016, *appeal dismissed for want of a substantial federal question*, 434 U. S. 989 (1977) 8
Hempel v. *American Airlines, Inc.*, 102 Misc. 2d 563, 423 N. Y. S. 2d 778 (1979) .....
Huddleston v. *Dwyer*, 322 U. S. 232 (1944) 4
Huff v. *White Motor Corp.*, 609 F. 2d 286 (7th Cir. 1979) 8
In re Air Crash Disaster At John F. Kennedy International Airport, 407 F. Supp. 244 (Jud. Pan. Mult. Lit. 1976) 4

PAGE

In re Air Crash Disaster At Boston, Massachusetts, 399 F. Supp. 1106 (D. Mass. 1975) 4

In re Air Crash Disaster Near Chicago, Illinois, 644 F. 2d 594 (7th Cir. 1981), 500 F. Supp. 1044 (N. D. Ill. 1980), 476 F. Supp. 445 (Jud. Pan. Mult. Lit. 1979) 2, 7

In re Paris Air Crash, 622 F. 2d 1315 (9th Cir.), *cert denied*, 66 L. Ed. 2d 237 (1980) 8, 10

Jackson v. *Koninklijke Luchtvaart Maatschappij N.V.*, 459 F. Supp. 953 (S. D. N. Y. 1978) 6

Jefferson v. *Chronicle Publishing Co.*, 108 Cal. App. 2d 538, 238 P. 2d 1018, *appeal dismissed for want of a substantial federal question*, 344 U. S. 803 (1952) 8

Johnson v. *International Harvester Co.*, 487 F. Supp. 1176 (D. N. D. 1980) 8

Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941) 4

Krause v. *State*, 31 Ohio St. 2d 132, 285 N. E. 2d 736, *appeal dismissed for want of a substantial federal question*, 409 U. S. 1052 (1972) 8

Minnesota v. *Clover Leaf Creamery Co.*, 66 L. Ed. 2d 659 (1981) 9

Moragne v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970) 9

Richards v. *United States*, 369 U.S. 1 (1962) 5

Robert v. *Ford Motor Co.*, 73 App. Div. 2d 1025, 424 N. Y. S. 2d 747 (1980) 8

Rosenfeld v. *Isaacs*, ____ App. Div. 2d ____, 433 N. Y. S. 2d 623 (1980) 8

Sibley v. *KLM-Royal Dutch Airlines*, 454 F. Supp. 425 (S. D. N. Y. 1978) 6

Van Dusen v. *Barrack*, 376 U. S. 612 (1964) 4

PAGE

Other Authorities

28 U. S. C. § 1292(b) 2
28 U. S. C. § 1407 1
Restatement (Second), Conflict of Laws 5
Holthus, *Punitive Damages In Wrongful Death*, 20 Clev. St. L. Rev. 301 (1971) 9
Note, *Wrongful Death Damages in North Carolina*, 44 N. C. L. Rev. 402 (1966). 9

IN THE

Supreme Court of the United States

October Term, 1980

SHUTAO H. LIN, as Administrator of the Goods, Chattels and Credits which were of SHU REN LIN, M.D., Deceased; JOSEPH P. MALACYNSKI, as Administrator of the Estate of MICHELLE MALACYNSKI, and JOSEPH P. MALACYNSKI, individually; DONALD R. LYON and SOPHIE H. LYON; and JANE S. SHATKIN, as Executrix of the Estate of LLOYD J. SHATKIN, Deceased,

Petitioners,

vs.

AMERICAN AIRLINES, INC. and McDONNELL DOUGLAS CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT McDONNELL DOUGLAS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

These actions arise out of the crash of a DC-10 aircraft manufactured by McDonnell Douglas Corporation (MDC) and owned and operated by American Airlines. Scheduled to fly from Chicago to Los Angeles, the aircraft crashed shortly after takeoff from O'Hare International Airport, killing all on board. Thereafter, a number of actions against American and MDC were filed in California, Illinois, New York, Puerto Rico, Hawaii, and Michigan. Pursuant to 28 U. S. C. § 1407, those actions not already pending in the United States District Court

for the Northern District of Illinois were transferred there for consolidated pretrial proceedings. 476 F. Supp. 445 (Jud. Pan. Mult. Lit. 1979).

Many of the complaints filed in these actions contained wrongful death counts praying for punitive damages. In the District Court, MDC and American moved to strike those portions of the complaints on the grounds that punitive damages for wrongful death were not recoverable under the relevant state wrongful death acts. The facts relevant to the choice of law determination are undisputed. MDC is a Maryland corporation with its principal place of business in Missouri. MDC's allegedly wrongful conduct occurred in California where the aircraft was manufactured. The injuries were sustained in Illinois where the plane crash occurred. The District Court denied MDC's motion (except as to the action filed in Puerto Rico), granted American's motion, and certified the issues for interlocutory appeal pursuant to 28 U. S. C. § 1292(b). 500 F. Supp. 1044 (N. D. Ill. 1980).

The Court of Appeals granted the applications for leave to appeal from the trial court's order and, after briefing and argument, reversed the trial court's order insofar as it held that the claims against MDC for punitive damages were legally sufficient claims. 644 F. 2d 594 (7th Cir. 1981). The Plaintiffs' Committee, which filed the lead briefs on behalf of the plaintiffs in the interlocutory appeals, has neither sought rehearing in the Court of Appeals nor petitioned this Court for a Writ of Certiorari. The vast majority of the plaintiffs in the courts below, therefore, waived any right to have this Court review the Court of Appeals' decision. Several of the plaintiffs who originally filed their actions in New York, however, have petitioned this Court to review the Court of Appeals' judgment. Pursuant to the direction of this Court, MDC respectfully submits this brief in opposition to that petition.

SUMMARY OF ARGUMENT

The choice of law questions raised by Petitioners are solely issues of state law which this Court declines to review except in extraordinary circumstances. No such circumstances are present in this case. Moreover, the decision of the Court of Appeals declining to apply the substantive law of a state with no legitimate interest in this litigation is correct under all of the state choice of law rules involved in these interlocutory appeals.

The Petitioners' equal protection attack on the unavailability of punitive damages is not properly raised as to MDC and, in any event, is without merit. Every court which has addressed the issue has upheld wrongful death statutes limited to compensatory damages. The statutes rationally serve the legitimate state purpose of limiting excessive liability in wrongful death actions. The Equal Protection Clause requires nothing more in cases of this kind.

THE WRIT SHOULD BE DENIED

I. NO REASON EXISTS FOR THIS COURT TO REVIEW THE INTERLOCUTORY JUDGMENT ON THE CHOICE OF LAW ISSUES PRESENTED IN THIS CASE, WHICH ARE ISSUES OF STATE LAW.

The choice of law questions presented by Petitioners are exclusively state law questions. There is no suggestion by Petitioners here, or by any of the plaintiffs in the courts below, that federal law determines the availability of punitive damages in these diversity actions. Absent, too, is any controversy about the proper role of the federal court in choosing which state's law to apply. As Petitioners acknowledge, and as both of the courts below held, the whole law of the state, including the choice of law rules where the several actions were filed prior to their transfer and consolidation, determines whether punitive damages are recoverable in these wrongful death actions. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941); *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964); *In re Air Crash Disaster At Boston, Massachusetts*, 399 F. Supp. 1106 (D. Mass. 1975). "[I]t is within the very nature of coordinated or consolidated pretrial proceedings in multidistrict litigation for the transferee judge to be called upon to apply the law of more than one state." *In re Air Crash Disaster At John F. Kennedy International Airport*, 407 F. Supp. 244, 246-47 (Jud.Pan.Mult.Lit. 1976). Thus, the Court of Appeals correctly looked to and applied the choice of law rules of each of the states where the actions consolidated below were originally filed.

The gist of Petitioners' argument is that the Court of Appeals erred in construing state choice of law rules. This Court "ordinarily ... accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts...." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944);

see, e.g., Estate of Spiegel v. *Commissioner,* 335 U. S. 701, 707-08 (1949); *General Box Co.* v. *United States,* 351 U. S. 159, 165 (1956); *Richards* v. *United States,* 369 U. S. 1, 16 n. 35 (1962). Nothing in this case warrants a departure from this practice.

Petitioners have cited no state or federal decision holding that the state of a defendant's principal place of business has an interest in having its law permitting punitive damages applied to the exclusion of contrary laws of all other interested states. There is no conflict between the decision of the Court of Appeals below and any decision of any state or federal court. Nor do Petitioners suggest that the Court of Appeals mistook the relevant choice of law rules. The Court of Appeals held that Illinois courts generally adhere to "the most significant relationship" test of the *Restatement (Second), Conflict of Laws.* Petitioners agree. The Court of Appeals held that California courts have adopted the "comparative impairment" approach. Petitioners agree. In the New York cases, the Seventh Circuit applied the "governmental interest" approach of *Babcock* v. *Jackson,* 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279 (1963). Petitioners agree. Petitioners merely quibble that the Court of Appeals misconstrued the concededly applicable state law.

II. NO CHOICE OF LAW RULE REQUIRED THE COURT OF APPEALS TO APPLY THE SUBSTANTIVE LAW OF MISSOURI, WHICH HAS NO INTEREST IN THIS LITIGATION.

Petitioners argue that no matter what choice of law rule is applied, the decisive factor in determining the availability of punitive damages must, *ipso facto,* be the defendant's principal place of business. No case, state or federal, is cited which so holds. Such a *per se* rule would be irrational and contrary to the flexible, fact-sensitive, and reasoned modern choice of law approaches now governing in most states. The state of a

defendant's principal place of business may have an interest in *denying* recovery of punitive damages in order to shield its domiciliaries from excessive financial burdens. *See, e.g., Sibley* v. *KLM-Royal Dutch Airlines,* 454 F. Supp. 425 (S. D. N. Y. 1978); *Jackson* v. *Koninklijke Luchtvaart Maatschappij N.V.,* 459 F. Supp. 953 (S. D. N. Y. 1978). But absent relevant contacts not present here, the state of defendant's place of business has no interest in permitting non-residents to sue for punitive damages in cases arising in other states.

Three states might be regarded as having an interest in the question whether punitive damages could be imposed on MDC: Illinois—the point of the flight's departure, the place of the injury, and, as the Court of Appeals noted, home of the world's busiest airport with a strong interest in encouraging air transportation in the state; California—the place of MDC's allegedly tortious conduct in the design and manufacture of the airplane, the place where, as the trial court noted, MDC has "substantial operations" and which also has an interest in encouraging business within its borders; and Missouri—MDC's home office.

MDC maintains that none of these states permits recovery of punitive damages for wrongful death. The Court of Appeals held that Illinois and California do not allow punitive damages but that Missouri does. Assuming *arguendo* that Missouri allows punitive damages, Missouri cannot have any interest paramount to either California or Illinois in allowing punitive damages in this case. In his concurring opinion in the Court of Appeals below, Judge Cudahy stressed the minimal interest of Missouri on the question of punitive damages:

> "Some question remains for me whether Missouri would, in fact, have a strong interest in imposing financial sanctions on its own corporate domiciliary, employing Missouri citizens and paying Missouri taxes, as punishment for that corporation's *extra-territorial* torts affecting non-residents of Missouri. The finding of such an interest may impute an unusual level of altruism to Missouri policy and may overstate the commitment of Missouri (or any other state)

> to "corporate accountability" in circumstances where both the misconduct and the injuries took place outside the borders of the domiciliary state." [644 F. 2d at 633.]

None of the choice of law rules at issue required the selection of the law of a state with no significant contacts with the parties or the occurrence. The Court of Appeals correctly declined to reach such an irrational result.

III. WRONGFUL DEATH ACTS DISALLOWING PUNITIVE DAMAGES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Petitioners' equal protection argument is diaphanous. It is apparently limited to a challenge to New York's wrongful death act, a law which Petitioners do not contend governs MDC's liability in these actions. Although the District Court considered various state and federal constitutional challenges to the laws of those states which do not allow punitive damages in wrongful death cases, the Court of Appeals noted "on this appeal the only specific constitutional attack is the argument that New York's denial of punitive damages violates the federal Equal Protection Clause." Thus, the constitutionality of the substantive law governing MDC's rights and liabilities is not properly before this Court. However, to the extent that Petitioners seek to challenge the laws of California and Illinois, which do not allow punitive damages in wrongful death cases, MDC makes the following response.

The Petitioners have not suggested that the various wrongful death statutes disallowing recovery of punitive damages discriminate on the basis of race, creed, religion, or create any other suspect classification. Nor has any argument been made that the statutes discriminate against non-residents either directly or through the application of choice of law principles. Equally clear is that no fundamental personal rights are infringed by these laws. Thus, the question Petitioners raise is whether the decision to withhold the possibility of punitive

damages in a wrongful death case while permitting punitive damages in other tort cases bears any rational relationship to any legitimate government purpose. Both of the courts below, as well as every other court which has considered the issue, have concluded that the disallowance of punitive damages does not violate this standard. *In re Paris Air Crash,* 622 F. 2d 1315 (9th Cir.), *cert. denied,* 66 L. Ed. 2d 237 (1980) (reversing 427 F. Supp. 701 (C. D. Cal. 1977)); *Huff* v. *White Motor Corp.,* 609 F. 2d 286, 298 (7th Cir. 1979); *Johnson* v. *International Harvester Co.,* 487 F. Supp. 1176 (D. N. D. 1980); *Georgie Boy Manufacturing, Inc.* v. *Superior Court,* 115 Cal. App. 3d 217, 171 Cal. Rptr. 382 (1981); *Robert* v. *Ford Motor Co.,* 73 App. Div. 2d 1025, 424 N. Y. S. 2d 747 (1980); *Rosenfeld* v. *Isaacs,* ____ App. Div. 2d ____, 433 N. Y. S. 2d 623 (1980); *Hempel* v. *American Airlines, Inc.,* 102 Misc. 2d 563, 423 N. Y. S. 2d 778 (1979).

These decisions upholding disallowance of punitive damages are in accord with numerous decisions of this Court, which has routinely dismissed equal protection attacks on state tort laws. *See, e.g., Glick* v. *Ballentine Produce Inc.,* 396 S. W. 2d 609 (Mo. 1965), *appeal dismissed for want of a substantial federal question,* 385 U. S. 5 (1966) (monetary ceiling of $25,000 on damages in wrongful death cases); *Jefferson* v. *Chronicle Publishing Co.,* 108 Cal. App. 2d 538, 238 P. 2d 1018, *appeal dismissed for want of a substantial federal question,* 344 U. S. 803 (1952) (statute barring recovery of damages for certain types of defamation); *Gentile* v. *Altermatt,* 169 Conn. 267, 363 A. 2d 1 (1975), *appeal dismissed for want of a substantial federal question,* 423 U. S. 1041 (1976) ("no fault" insurance statute); *Hill* v. *Garner,* 277 Ore. 641, 561 P. 2d 1016, *appeal dismissed for want of a substantial federal question,* 434 U. S. 989 (1977) (guest statute); *Krause* v. *State,* 31 Ohio St. 2d 132, 285 N. E. 2d 736, *appeal dismissed for want of a substantial federal question,* 409 U. S. 1052 (1972) (sovereign immunity). Each of those dismissals constituted a ruling on the merits. *Hicks* v. *Miranda,* 422 U. S. 332, 343-45 (1975).

The rational basis for the laws Petitioners attack here is evident from the history and purpose of wrongful death acts. An action for wrongful death was unknown at common law. *See Baker* v. *Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (1808); *Aetna Life Insurance Co.* v. *Moses,* 287 U. S. 530, 539 (1933). *See generally Moragne* v. *States Marine Lines, Inc.,* 398 U. S. 375 (1970). To alleviate the harsh consequences of the common law rule, all American state legislatures have enacted statutes providing a remedy for wrongful death to the decedent's survivors. In line with the statutes' remedial purposes, however, most states do not allow an award of punitive damages. *See* Holthus, *Punitive Damages In Wrongful Death,* 20 Clev. St. L. Rev. 301, 302-03 (1971); Note, *Wrongful Death Damages in North Carolina,* 44 N. C. L. Rev. 402, 421 (1966).

In correcting the inequities of the common law rule prohibiting actions for wrongful death, the legislatures of the various states were not constitutionally required to create a wrongful death remedy with all kinds of damages available in other causes of action sounding in tort or otherwise. As this Court recently stated:

> "This Court made clear that a legislature need not 'strike at all evils at the same time or in the same way,' . . . and that a legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'" [*Minnesota* v. *Clover Leaf Creamery Co.,* 66 L. Ed. 2d 659, 670 (1981).]

Petitioners would ignore the fact that a legislature often seeks to accommodate several purposes in enacting legislation. Suffice it to say that the failure to allow punitive damages in wrongful death cases is rationally related to the legitimate state purpose of protecting defendants from excessive liability. "The frequently violent and dramatic circumstances of accidents that lead to wrongful death actions not only would pose [the] danger of extreme awards, but might also increase the temptation for a jury to award punitive damages even when concrete

elements of fraudulent or intentional wrongdoing are absent." *In re Paris Air Crash*, 622 F. 2d 1315, 1323 (9th Cir.), *cert. denied*, 66 L. Ed. 2d 237 (1980).

The fashioning of rules of tort law and appropriate remedies is a matter left to the states. A state can rationally decide that it would not serve the purposes of its wrongful death act to confer standing upon a deceased's survivors to seek quasi-criminal penalties from the alleged wrongdoer. Each court which has considered the issue has so held, as did both of the courts below. No substantial federal question is presented here, and the Petitioners have failed to advance any reason why this Court should grant review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN J. BARRY
JOSEPH P. DELLA MARIA, JR.
ROGER J. GUERIN

Attorneys for Respondent, McDonnell Douglas Corporation
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345

Of Counsel:
PHILIP B. KURLAND, ESQ.
ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
VERYL L. RIDDLE, ESQ.
THOMAS C. WALSH, ESQ.
JOHN J. HENNELLY, JR., ESQ.
BRYAN, CAVE, MCPHEETERS & MCROBERTS
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
JAMES M. FITZSIMONS, ESQ.
GARRETT J. FITZPATRICK, ESQ.
MENDES & MOUNT
Three Park Avenue
New York, New York 10016
(212) 683-2400